Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

SHELDON P. KOTTLE, M.D.,

Petitioner,

v.

NORTHWEST KIDNEY CENTERS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "sham exception" to the Noerr-Pennington doctrine, has plaintiff sufficiently stated a cause of action where he has alleged that defendant, a monopolist in the provision of kidney dialysis services in the relevant geographical market, made intentional misrepresentations and false statements in an adjudicatory proceeding before a state administrative body in a successful effort to exclude plaintiff from the market?

PARTIES TO THE PROCEEDING

The parties to the proceedings below were:

Appellant (Petitioner herein): Sheldon P. Kottle, M.D.

Appellee (Respondent herein): Northwest Kidney Centers

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PETITION FOR WRIT OF CERTIORARI

Sheldon P. Kottle, M.D. ("Kottle") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 18, 1998, in order to clarify an important issue expressly left open in a prior opinion of the Supreme Court and to resolve the conflict between the Ninth and the Fourth, Eleventh and District of Columbia Circuit Courts of Appeals on the important issue presented herein.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit that gives rise to this petition was filed June 18, 1998 and is published at 146 F.3d 1056 (9th Cir. 1998). It is reprinted in Appendix A hereto ("App. A") at page A-1. By order filed August 19, 1998, the Ninth Circuit denied Kottle's timely petition for rehearing. App. D-1.

JURISDICTION

On October 4, 1996, the United States District Court for the Western District of Washington issued a judgment and order granting Northwest Kidney Centers' ("NWK") motion to dismiss Kottle's antitrust complaint pursuant to Fed. R. Civ. P. 12(b)(6). Kottle's timely-filed motion for reconsideration was denied by the district court on October 30, 1996.

Kottle appealed to the Ninth Circuit, which affirmed in a published opinion filed on June 18, 1998. On August 19, 1998 the Ninth Circuit denied Kottle's timely motion for rehearing. Pursuant to Supreme Court Rule 13.3, this petition has been filed within ninety (90) days of the denial of the rehearing. The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sherman Act §§ 1 and 2, 15 U.S.C. §§ 1, 2; Revised Code of Washington (RCW) 19.86.030 *et seq.*, and 70.38.115; Chapter 246-310 of the Washington Administrative Code (WAC) sections 190, 200(1), 210(1)(b) and (2), and 500(3) and (6). These statutes and regulations appear verbatim at Appendix E1-E5.

STATEMENT OF THE CASE

The fundamental issue in this case is whether intentional misrepresentations and false statements made to a state administrative body in an adjudicatory proceeding can constitute a "sham" sufficient to remove petitioning activity from the protection of the *Noerr-Pennington* doctrine. While the Court has discussed this issue in prior rulings, it has never resolved the question; meanwhile, those Circuit Courts of Appeals which have addressed the issue have resolved it in conflicting manner.

The essence of Kottle's claims against NWK for violations of federal and state antitrust law was stated by the Ninth Circuit in its published opinion:

> Plaintiff-appellant Sheldon P. Kottle is a physician specializing in nephrology and transplant medicine. Kottle is the sole officer and shareholder of King County Kidney Center ("KCKC"). In 1991, Kottle filed CON applications with the Department seeking approval to build two kidney dialysis centers under the name KCKC. At that time, defendant Northwest Kidney Centers ("NWK") was the only provider of kidney dialysis services in King County. Perceiving Kottle to be a threat to its monopoly, NWK began a hostile campaign to prevent Kottle from establishing KCKC within NWK's market. NWK undermined Kottle's business negotiations and aggressively opposed Kottle's CON applications using methods and means which were improper and unlawful. NWK made false statements of fact and misrepresentations about Kottle and KCKC and encouraged others to do so. NWK's false statements and misrepresentations included the need for kidney dialysis services in King County. Influenced by NWK's statements, the Department rejected Kottle's CON applications on March 30, 1992. At all times, NWK acted with the intent of eliminating competition and preserving its monopoly in the kidney dialysis market in King County. In 1995, NWK filed its own CON application for a similar dialysis facility at the same location. Contrary to its own statements opposing Kottle's CON application in 1992, the data presented by NWK in 1995 show that it knew of the need for

> kidney dialysis services in King County over the past 15 years.

App. A3-4.

The District Court, acting on NWK's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), dismissed Kottle's complaint stating that his allegations were insufficient to avoid the protection afforded petitioning activity under the Noerr-Pennington doctrine. Kottle filed his Notice of Appeal after the District Court denied his motion for reconsideration.

The Ninth Circuit affirmed, holding that Kottle's allegations of intentional misrepresentations and false statements did not meet the sham exception under *Noerr*. Finding that the CON determination by the State of Washington Department of Health reflected "a true adjudicatory proceeding", App. A14, the Ninth Circuit applied the sham *litigation* exception articulated by this Court in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993). Applying this standard, the Ninth Circuit determined that Kottle could avoid the Noerr-Pennington doctrine only if his allegations showed one of three things: (1) NWK's advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) NWK engaged in a pattern of petitions before the Department without regard to the merit of the petitions; or (3) NWK's misrepresentation before the Department deprived the entire CON proceeding of its legitimacy. App. A14-15.

The Court summarily dismissed as inapplicable two of these three grounds for applying the sham litigation exception.

> We can easily dispense with the second of these grounds because Kottle's complaint alleges interference with only two CON applications . . . We can also dispense with the first of these grounds. NWK's advocacy before the Department was not objectively baseless because NWK prevailed. In the litigation context, the Supreme Court has reminded us that a winning lawsuit is, by definition, not objectively baseless. *Professional Real Estate*, 508 U.S. at 61 n.5. Because we view the CON hearing as analogous to litigation, we must conclude that a victory before the Department necessarily indicates that NWK's position was not objectively baseless. . . . This leaves Kottle with only the third of the sham exception possibilities. Notwithstanding Noerr-Pennington, Kottle can overcome a 12(b)(6) motion if his allegations demonstrate that NWK so misrepresented the truth to the Department that the entire CON proceeding was deprived of its legitimacy. Kottle's complaint, however, falls far short of adequately alleging this variant of the sham exception.

App. A14-16.

Kottle's petition for rehearing was denied.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit's Opinion Squarely Presents To This Court The Unresolved Issue Of Whether Misrepresentations In The Administrative Adjudicatory Context Removes The Protections Afforded By The Noerr-Pennington Doctrine.

In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965), this Court articulated general principles of immunity that the federal antitrust laws did not apply to attempts by competitors to petition the government, even if the result of such petitioning were anti-competitive. *Noerr* held that the Sherman Act did not apply to a successful campaign by railroad executives to create public distrust of the freight trucking industry, a campaign that led to numerous state laws regulating freight trucking, since the application of the antitrust laws to "political activity" would frustrate the workings of a democratic government and likely would raise significant First Amendment concerns. 365 U.S. at 129-32, 137-38. In *United Mine Workers v. Pennington*, this Court extended *Noerr* to "concerted effort[s] to influence public officials." 381 U.S. 657, 670 (1965). However, the immunity provided by what subsequently became known as the *Noerr-Pennington* doctrine was not absolute and an antitrust plaintiff could still proceed if it could be shown that the petitioning activity at issue was a mere "sham".

In *Professional Real Estate Investors Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993), the Court outlined a two-part definition of sham litigation. First, the

Court stated, "the lawsuit must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits . . . Only if the challenged litigation is objectively meritless may a Court examine the litigant's subjective motivation." *Id.*, at 60. Furthermore, the Court stated that "a winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id.* at 61 n.5.

In articulating this two-part definition of sham litigation, the Court expressly left open the issue first raised in *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 512-513 (1972) and presented in this case: namely, whether *Noerr* permits imposition of antitrust liability for a competitors' false statements or other misrepresentations in an administrative adjudicatory proceeding.

> In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transport*, 404 U.S. at 512-513, 30 L. Ed. 2d at 642, 92 S.Ct. 609. ***We need not decide here whether and, if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations.***

Id. at 61 n.6 (emphasis added).

The need to distinguish "misrepresentations . . . used in the *adjudicatory* process" from sham *litigation* for purposes of applying *Noerr* protection becomes clear when

one considers how ill-suited the two-part sham *litigation* standard is for the *adjudicatory* setting before an administrative body. This Court appears to have anticipated such a distinction in its footnote 6 in *Professional Real Estate Investors*. There would be no other purpose served by the footnote if the Court had actually intended the two-part definition of "sham" litigation to be applied in exactly the same manner as "shams" involving misrepresentations in the adjudicatory process.

By its own language, the two-part test for sham in *Professional Real Estate Investors* reflects that the type of "sham exception" the Court was discussing was directed only toward sham litigation. Articulating the first part of its test, the Court stated that the suit must be "objectively baseless in the sense that no reasonable *litigant* could realistically expect success on the merits"; second, "the baseless lawsuit" must conceal an attempt to interfere directly with the business relationships of the competitor. Furthermore, only if the "suit" is found to be objectively baseless does the Court proceed to examine the "*litigants'* " subjective intent. *Id.* at 624. These standards are unique to the litigation context and do not readily apply to the adjudicatory process before a state administrative body.

The scope of the sham exception and the standards by which it is to be applied must take into account the different branches of government and the different level of immunity appropriate to each. As the Ninth Circuit itself recognized in a previous published opinion, administrative agencies are significantly more vulnerable to intentional misrepresentations by a party's competitors in adjudicatory proceedings. *See Clipper Exxpress v. Rocky*

Mountain Motor Tariff Bureau, Inc., et al., 690 F.2d 1240 (9th Cir. 1980), *cert. denied* 459 U.S. 1227 (1983).

> [T]he [administrative] adjudicatory sphere is much different from the political sphere. There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.

Id., at 1261.

The first part of the two-part sham *litigation* exception requires that an antitrust plaintiff show that the petitioning activity was "objectively baseless"; the Court went on to state that this threshold would be impossible to meet where the petitioning activity is successful. While such a standard has merit in the context of litigation where rules of evidence, broad discovery and the right of cross examination allow for a fair and impartial hearing, it does not readily apply in the administrative adjudicatory context.

While the mere fact of successful litigation often precludes a finding of sham litigation, misrepresentations and false statements to administrative bodies should not be immunized simply as a result of their success. *See California Motor Transport*, 404 U.S. at 513. If mere success immunizes a defendant's conduct, there would simply be no claim. By *winning* in an administrative adjudicatory proceeding, a victorious plaintiff would have no incentive

to apply for relief under the antitrust laws; by *losing* before such a body, plaintiffs would have no cause of action under the "objectively baseless" standard – never mind the unfair tactics used or the false and deceptive data presented. The result is wholly illogical and contrary to sound public policy. By definition, false statements and misrepresentations *are* "objectively baseless", irrespective of their successful effect on administrative agencies.

Applying an "intentional misrepresentation" standard rather than a "baseless litigation" standard in the kind of administrative adjudicatory context involved in this case is not only consistent with this Court's prior ruling in *California Motor Transport,* but it would also be consistent with other Circuit Courts of Appeals which have examined the scope of the sham exception in this context. *See St. Joseph's Hosp. v. Hospital Corp. of America,* 795 F.2d 948, 955 (11th Cir. 1986) ("The plaintiff here has alleged misrepresentations before a governmental agency . . . misrepresentation under these circumstances do not enjoy *Noerr* immunity."); *Hospital Building Company v. Rex Hospital,* 691 F.2d 678 (4th Cir. 1982), *cert. denied,* 464 U.S. 890 (1983) ("[M]isrepresentations, to fall within the sham exception to *Noerr-Pennington* immunity, must be made with the requisite intent. In these circumstances . . . misrepresentations made with intent to abuse the administrative processes . . . fall within the sham exception."); *Israel v. Baxter Laboratories, Inc.,* 466 F.2d 272, 275-80 (D.C. Cir. 1972) ("No actions which impair the fair and impartial functioning of an administrative agency should be allowed to hide behind the cloak of an antitrust exemption."); and *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., et al.,* 690 F.2d 1240, 1261 (9th Cir.

1980), *cert. denied*, 459 U.S. 1227 (1983) ("We hold that the fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for imposition of antitrust liability, if the requisite intent is present and the other elements of an antitrust claim are proven. . . . There is no first amendment protection for furnishing with predatory intent false information to an administrative or adjudicatory body.").

II.

The Ninth Circuit's Opinion Directly Conflicts With The Eleventh Circuit's Opinion in *St. Joseph's Hospital.*

The decision below is in direct conflict with the Eleventh Circuit's in *St. Joseph's Hosp. v. Hospital Corp. of America*, 795 F.2d 948 (11th Cir. 1986) on similar facts. In that case, St. Joseph's Hospital filed an application with the state of Georgia for a Certificate of Need (CON) to enable it to expand its cardiac care services to include cardiac surgical services. Memorial Medical Center (MMC), a competing general acute care hospital in Savannah, Georgia, opposed St. Joseph's application contending that it (MMC) had the current capacity to perform the type of open heart procedures to be offered by St. Joseph's and that its current capacity exceeded the requirements for the region, thereby making St. Joseph's entering into the market "unnecessary." St. Joseph's request for a CON was denied based upon the state of Georgia's determination that the services offered by CON would unnecessarily duplicate the services being provided by MMC.

Four months later, St. Joseph's filed a complaint, alleging that the defendant MMC had conspired to prevent St. Joseph's establishment of a cardiac surgery program in violation of the Sherman Act. *Id.* at 952-953. The central focus of St. Joseph's allegations, as stated in its Complaint, was that the defendant MMC had "submitted false information to the [state of Georgia] and the [state of Georgia] relied on that information in denying St. Joseph's application."

Like NWK, the defendant in *St. Joseph's* filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) relying upon Noerr-Pennington immunity. The District Court granted the motion and the Eleventh Circuit reversed. *Id.* at 957. The Eleventh Circuit determined that St. Joseph's allegation that MMC had made misrepresentations and false statements regarding its current capacity and ability to meet existing needs of the region were sufficient to preclude dismissal for failure to state a claim:

> The plaintiff here has alleged misrepresentations before a governmental agency. When a governmental agency . . . is passing on specific certificate applications it is acting judicially. Misrepresentations under these circumstances do not enjoy *Noerr* immunity.

St. Joseph's Hosp., 795 F.2d at 955.

NWK's illicit statements and conduct, as alleged herein, are indistinguishable from the conduct to which Eleventh Circuit applied the "sham exception" and reversed the District Court's granting of a motion to dismiss. Like the defendant in *St. Joseph's Hospital*, defendant NWK misrepresented the need for kidney dialysis

services in King County and its ability to meet the needs of King County residents with its then current capacity.

For the reasons stated in the preceding section, *St. Joseph's Hospital* presents the better reasoned approach to intentional misrepresentations and false statements before administrative adjudicatory agencies and is the approach being followed by other circuits. The conflict between the approach of the Eleventh Circuit and the Ninth Circuit should be resolved by this Court. *See Acosta v. Louisiana Dept. of Health and Human Res.*, 478 U.S. 251, 253 (1986) (Court granted petition for writ of certiorari to resolve conflicting interpretations of Fed. R. App. P. 4 and affirmed in *per curiam* opinion).

III.

The Ninth Circuit's Opinion Conflicts With This Court's Prior Rulings Regarding The Sufficiency Of Allegations In A Complaint To Withstand Motions To Dismiss Pursuant To Federal Rules Of Civil Procedure 12(b)(6).

This Court has stated that the liberal rules as to the sufficiency of a complaint make it a rare case in which a motion to dismiss should be granted pursuant to Fed. R. Civ. P. 12(b)(6). "[I]n appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45 (1957). For purposes of a motion to dismiss, the complaint is to be construed in the light most favorable to

plaintiff and its allegations are to be taken as true. *Scheuer v. Rhodes*, 416 U.S. 232 (1974). This liberal pleading standard is particularly important in antitrust litigation, as this Court stated in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962):

> Summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.

Id. at 473. However, in its published opinion, the Ninth Circuit imposed a pleading standard that is nearly insurmountable in the absence of some formal discovery.

Kottle's complaint (CR 1)[1] specifically alleged that:

> 1. NWK organized a hostile campaign against Kottle which (a) prevented him from establishing a nephrology practice in the area and (b) hindered negotiations for lease of office and business space. (¶ 3.4)
>
> 2. NWK made false statements and intentional misrepresentations about Kottle and his proposed dialysis facilities and about (1) the objective need for kidney dialysis services in King County and (2) NWK's then existing capacity. (¶ 3.6)
>
> 3. NWK encouraged and coordinated the involvement of other business entities to oppose Kottle's CON application on false or misleading premises. (¶ 3.5)

---

[1] "CR" refers to the Court Record before the Ninth Circuit.

> 4. NWK's false statements and intentional misrepresentations were intended to and did influence the Department of Health to reject Kottle's CON applications. (¶3.6) and that
>
> 5. NWK acted with the sole intent of eliminating competition and preserving its monopoly in the provision of kidney dialysis services in King County. (¶ 3.4)

Although these are precisely the allegations which the Eleventh Circuit found sufficient to sustain a complaint for antitrust injury in *St. Joseph's Hospital*, Kottle did not simply rest upon these allegations; he supported them with substantial evidence from the same source of public records the Ninth Circuit deemed admissible in the context of an NWK affidavit submitted with its reply brief in the District Court. App. A17 n.7. As Kottle emphasized at oral argument in the court below, the record contains specific evidence showing that:

1. NWK purposely understated dialysis station need by 36%.

In 1992, when opposing Kottle's CON application, NWK stated " . . . through the year 1996, the number of stations [122] required in King County are already here . . . " CR 31 Exhibit 1, p. 19. However, in 1995 NWK stated that 20 additional stations had been built, 14 were pending and it was applying for 10 more. CR 38 Exhibit 1, p. 35.

2. NWK planned the identical center they opposed as "unnecessary".

The specification plans dated April 1994 contained in NWK's 1995 application to the State of Washington CON Board revealed that NWK was planning to construct a kidney dialysis facility of the identical name, size, and location as Kottle's – which they had presented false data showing it to be unnecessary. CR 38 Exhibit 1, pp. 7, 88; CR 31 Exhibit 1 pp. 17-20.

3. NWK reported false numbers from its records on home dialysis.

In 1992 NWK falsely reported that "the Northwest Kidney Center's historical database has shown actually that the home population has remained relatively stable over the last three years". However, in 1995 NWK presented contradictory data reflecting a clear decline in home dialysis treatments each year from 1989-1991. CR 31 Exhibit 1, p. 23; CR 38 Exhibit 1, p. 16.

4. NWK falsely reported that Kottle's center would increase health costs.

Although it had claimed otherwise at the time it was opposing Kottle's CON applications, in 1995 NWK admitted that reimbursements for kidney dialysis services were "not subject to, or affected by . . . expenditures by providers. Thus, the proposed expenditures will have no impact on charges for services." CR 38 Exhibit 1, p. 41.

5. NWK knew its opposition to Kottle's CON would result in a shortage of dialysis services.

In 1995 NWK admitted in its own application for the dialysis center it previously opposed that "In the absence of additional outpatient dialysis stations, NWK will no longer be able to meet the dialysis needs . . . in east King County", and "unless additional capacity is created there will be ***another*** shortage of dialysis stations . . . ". CR 38 Exhibit 1, p. 30, 35 (emphasis added).

Kottle also claimed that among NWK's "improper and/or unlawful methods of advocacy" were ***ex parte*** contacts with the Department of Health during the time it was actively opposing Kottle's CON application in a successful effort to change the methodology for calculating the need for dialysis facilities. CR 36 at ¶ 3.; CR 31 Exhibit 1, p. 18. These ***ex parte*** contacts occurred before and immediately after the public hearing on Kottle's applications, in violation of WAC 246-310-190. App. E4. NWK's ***ex parte*** intervention got the Department of Health to apply a different standard to determine kidney dialysis need than had been set forth in the regulations. While ***ex parte*** communications between a competitor and a governmental entity are insufficient to avoid Noerr-Pennington immunity in the *political* or *legislative* context, *see City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), ***ex parte*** contacts are highly improper in the *adjudicatory setting* when a competitor's application is pending.

Kottle specifically alleged that NWK's false statements regarding the objective need for dialysis services and NWK's capacity to meet the projected need "were

intended to, and did, influence the Department of Health to reject Plaintiff's application" for certificates of need for the two dialysis facilities he proposed to build in King County. CR 1 at ¶ 3.6. NWK's false statements went to the core of the proceedings. As the statutes and regulations reflect, the touchstone of the certificate of need process is a determination of current and projected need for the services being proposed, and the ability of the existing facilities to meet those needs. RCW 70.38.115, App. E2, and WAC 246-310-200 and 210, App. E4-5. NWK admitted as much in its testimony opposing Kottle's CON. CR 31 Exhibit 1 at p. 17.

When false statements and intentional misrepresentations are made about these two "core" issues, it cannot help but infect the entire process – whatever the modest opportunity an applicant has to present contrary arguments. This is reflected in the Washington Department of Health regulations regarding CON proceedings. WAC 246-310-500(3)(a) and (6)(a) authorize the Department to suspend or revoke a CON for cause "which shall include, but not be limited to":

(i) Suspicion of fraud,

(ii) Misrepresentation,

(iii) False statements,

(iv) Misleading statements,

(v) Evasion or suppression of material facts in the application for a certificate of need or any of its supporting materials.

App. E6-7. CON applications granted even in part on the basis of false statements, misrepresentations or misleading statements are tainted and the process leading to the granting of such applications has been corrupted. When false statements and misrepresentations made by a successful ***applicant*** sufficiently corrupt the CON process as to warrant suspension of the CON, logic and common sense dictate that a similar corruption of the process occurs when such statements are made by a successful ***opponent*** of the CON.

Kottle has pled as specifically as can be expected that the core proceedings were corrupted. By ruling otherwise, the Ninth Circuit has placed an insurmountable burden upon plaintiff to ***prove*** somehow in the context of his complaint that the defendant's egregious conduct actually deprived the "core proceeding" of legitimacy. This simply cannot be done without some modicum of discovery. Rather, it should be sufficient at this stage of litigation for Kottle to specifically allege that defendant made materially false and deceptive statements to the Department of Health during the CON proceedings which influenced the Department of Health to deny plaintiff's CON application. Just as the perjury of a material witness corrupts a judicial proceeding and constitutes grounds for a new trial, false and deceptive statements made to an administrative body corrupts the decision-making process at that level – and all the more so when such statements are successful in persuading the administrative body to take the desired course of action.

There is nothing vague or ambiguous about the numbers contained in Kottle's pleadings supporting his antitrust claims against NWK, nor is there anything

vague about the impact NWK's intentional misrepresentations and false statements had on the CON proceeding before the Department of Health. The complaint and supporting pleadings include allegations of the specific activities not protected by *Noerr*. By insisting on a level of detail and specificity beyond that contained in Kottle's complaint and supporting materials, the Court essentially adopts a standard requiring "fact" pleading in such cases rather than the "notice" pleading provided in federal civil rules. Under the legal standards articulated by this Court in *Conley v. Gibson* and *Poller v. Columbia Broadcasting System*, the motion to dismiss for failure to state a claim should have been denied.

CONCLUSION

For the reasons set forth above, Dr. Kottle respectfully requests that the Court grant his petition for writ of certiorari.

Respectfully submitted,

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November 16, 1998.

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SHELDON P. KOTTLE, *Plaintiff-Appellant,* v. NORTHWEST KIDNEY CENTERS, *Defendant-Appellee.*	No. 96-36258 D.C. No. CV 96-0472 CRD OPINION

Appeal from the United States District Court
for the Western District of Washington
Carolyn R. Dimmick, District Judge, Presiding

Argued and Submitted
May 6, 1998 – Seattle, Washington

Filed June 18, 1998

Before: David R. Thompson and A. Wallace Tashima, Circuit Judges, and Tom Stagg, District Judge.*

Opinion by Judge Tashima

COUNSEL

Mark G. Olson, Everett, Washington, for the plaintiff-appellant.

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* The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

Douglas C. Ross, Davis Wright Tremaine, LLP, Seattle, Washington, for the defendant-appellee.

OPINION

TASHIMA, Circuit Judge:

In this case we apply the *Noerr-Pennington* doctrine in the context of an administrative proceeding. Specifically, we must determine whether the scope of the "sham" exception is different in an administrative proceeding than in litigation.

I. Background[1]

In 1979, the State of Washington enacted the Health Planning and Resource Development Act (the "Act"). RCW 70.38. The Act declares that it is the "public policy of this state" to engage in health planning and encourage both consumers and providers throughout the state to be involved so as to control "excessive increases in costs." RCW 70.38.015(1). The Act authorizes the Department of Health (the "Department") to administer a Certificate of Need ("CON") program to allocate health care resources. RCW 70.38.105(1). Under the CON program, the establishment of a new health care facility is subject to approval by the Department. RCW 70.38.105(4)(a). A kidney dialysis treatment center is such a health care facility subject to approval. WAC 246-310-010(18).

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[1] Because this is an appeal from a dismissal for failure to state a claim, we take Kottle's factual allegations as true. *Federation of African American Contractors v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir.1996).

After receiving a CON application, the Department may conduct a public hearing. RCW 70.38.115(9). At the hearing, any person may appear and be represented by counsel and may present oral and written argument and evidence. An "affected" person may also appear and "conduct reasonable questioning of persons who make relevant factual allegations." WAC 246-310-180(5). Any health care facility that provides services similar to those sought to be provided by the applicant is considered an "affected person." WAC 246-310-010(2)(b). Following the hearing, the Department must issue written findings. WAC 246-310-490(1). An applicant who has been denied a CON has the right to appeal the Department's decision to an adjudicative proceeding governed by the Washington Administrative Procedure Act ("APA"). RCW 70.38.115(10); WAC 246-310-610.

Plaintiff-appellant Sheldon P. Kottle is a physician specializing in nephrology and transplant medicine. Kottle is the sole officer and shareholder of King County Kidney Center ("KCKC"). In 1991, Kottle filed CON applications with the Department seeking approval to build two kidney dialysis centers under the name KCKC. At that time, defendant Northwest Kidney Centers ("NWK") was the only provider of kidney dialysis services in King County. Perceiving Kottle to be a threat to its monopoly, NWK began a hostile campaign to prevent Kottle from establishing KCKC within NWK's market. NWK undermined Kottle's business negotiations and aggressively opposed Kottle's CON applications using methods and means which were improper and unlawful. NWK made false statements of fact and misrepresentations about Kottle and KCKC and encouraged others to

do so. NWK's false statements and misrepresentations included the need for kidney dialysis services in King County. Influenced by NWK's statements, the Department rejected Kottle's CON applications on March 30, 1992.[2] At all times, NWK acted with the intent of eliminating competition and preserving its monopoly in the kidney dialysis market in King County. In 1995, NWK filed its own CON application for a similar dialysis facility at the same location. Contrary to its own statements opposing Kottle's CON application in 1992, the data presented by NWK in 1995 show that it knew of the need for kidney dialysis services in King County over the past 15 years.

In this action, Kottle alleged that NWK has unreasonably restrained trade and attempted to monopolize the market for kidney dialysis services in violation of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2. The complaint also alleged supplemental state law claims for violation of Washington's antitrust law, RCW 19.86.030 *et seq.* The district court dismissed the action for failure to state a claim upon which relief can be granted. It held that NWK's activities were protected by the *Noerr-Pennington* doctrine. Kottle appeals, and we affirm.

II. The Noerr-Pennington Doctrine

The First Amendment to the United States Constitution guarantees the right "to petition the Government for

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[2] The record does not indicate whether Kottle exercised his right to appeal the Department's decision to an adjudicatory hearing.

a redress of grievances." U.S. Const. amend. I, cl. 6. The Supreme Court has long recognized that for the Petition Clause to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way. In *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the Court rejected antitrust liability stemming from an aggressive lobbying campaign by railroads to persuade states to adopt legislation that would severely limit competition from truckers. The Court explained that "[i]n a representative democracy such as this . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. The Court then concluded that the Sherman Act did not apply to the railroads' advocacy of legislative action, notwithstanding their anticompetitive intent. *Id.* at 138.

The Court subsequently expanded the holding of *Noerr* to include activities aimed at the executive and judicial branches of government. *United Mine Workers v. Pennington*, 381 U.S. 657, 669-70 (1965) (executive); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (judicial). The Court explained that "the right to petition extends to all departments of the Government," and therefore, "[t]he same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *California Motor Transp.*, 404 U.S. at 612-13.

This circuit has clarified that the *Noerr-Pennington* doctrine is not merely a narrow interpretation of the

Sherman Act in order to avoid a statutory clash with First Amendment "values." Rather, the doctrine is a direct application of the Petition Clause, and we have used it to set aside antitrust actions premised on state law, as well as those based on federal law. *E.g., Amarel v. Connell,* 102 F.3d 1494, 1524 (9th Cir. 1996). Thus, the *Noerr-Pennington* doctrine sweeps broadly and is implicated by both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying or advocacy before any branch of either federal or state government.[3]

Given the sweep of the *Noerr-Pennington* doctrine, we have no difficulty in joining our sister circuits to conclude that a lobbying effort designed to influence a state administrative agency's decision to issue a CON is within the ambit of the doctrine. *See Tarabishi v. McAlester Regional Hosp.*, 951 F.2d 1558, 1570 n.17 (10th Cir. 1991); *St. Joseph's Hosp. v. Hospital Corp. of America,* 795 F.2d 948, 955 (11th Cir. 1986). Indeed, in *Boulware v. State of Nev. Dep't of*

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[3] Of course, since the Petition Clause mentions only the right "to petition the *Government* for a redress of grievances," U.S. Const. amend. I, cl. 6 (emphasis added), the *Noerr-Pennington* doctrine does not protect lobbying efforts directed at private organizations. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499-500 (1988). Kottle reads into *Allied Tube* a distinction between "political" and "economic" lobbying activity, from which he argues that the *Noerr-Pennington* doctrine does not apply in this case because NWK's activities were designed only to promote NWK's own economic gain. Such a distinction would render the doctrine a nullity since it is doubtful that an antitrust defendant exists that was not motivated by economic gain. We read *Allied Tube* more narrowly, as merely recognizing the public/private distinction recognized in the Petition Clause itself.

Human Resources, 960 F.2d 793 (9th Cir. 1992), we applied the *Noerr-Pennington* doctrine in the context of a state lawsuit that invoked a CON program in an attempt to quash competition. *See also Potters Med. Ctr. v. City Hosp. Ass'n*, 800 F.2d 568, 577-78 (6th Cir. 1986) (same). The only difference between *Boulware* and this case is that the advocacy here occurred before an administrative agency rather than a court. But since *Noerr-Pennington* protects advocacy before all branches of government, *California Motor Transp.*, 404 U.S. at 510, this is a distinction without a difference.[4] Accordingly, NWK's activities in this case implicate the *Noerr-Pennington* doctrine.

III. The Sham Exception

The more difficult question is whether NWK's activities fall within the "sham" exception to the *Noerr-Pennington* doctrine. In *Noerr*, the Court acknowledged that "[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere with the business relationships of a competitor, and the application of the Sherman Act would be justified." 365 U.S. at 144. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court explained:

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[4] The present case is also analogous to *Assigned Container Ship Claims, Inc. v. American President Lines, Ltd.*, 784 F.2d 1420 (9th Cir. 1986), in which we extended *Noerr-Pennington* immunity to petitions before the Federal Maritime Administration concerning the need for additional American flag ocean carrier service. *Id.* at 1422.

> The "sham" exception to *Noerr* encompasses situations in which persons use the governmental process – as opposed to the outcome of that process – as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. A "sham" situation involves a defendant whose activities are not genuinely aimed a procuring favorable government action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means.

Id. at 380, 111 S.Ct. 1344 (citations and quotation marks omitted).

Although the *Noerr-Pennington* doctrine applies to activities directed at any branch of government, the scope of the sham exception depends on the type of governmental entity involved. *See California Motor Transp.*, 404 U.S. at 513 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."); *Boone v. Redevelopment Agency*, 841 F.2d 886, 896 (9th Cir. 1988). When the branch of government involved is a court of law, this circuit recognizes three circumstances in which an antitrust defendant's activities might fall into the sham exception. First, if the alleged anticompetitive behavior consists of bringing a single sham lawsuit (or a small number of such suits), the antitrust plaintiff must demonstrate that the lawsuit was (1) objectively baseless, and (2) a concealed attempt to interfere with the plaintiff's business relationships. *Professional Real Estate Investors, Inc. v. Columbia Pictures*

Indus., Inc., 508 U.S. 49, 60-61 (1993); *Amarel*, 102 F.3d at 1518-19; *USS-POSCO Indus. v. Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800, 810-11 (9th Cir. 1994).

Second, if the alleged anticompetitive behavior is the filing of a series of lawsuits, "the question is not whether any one of them has merit – some may turn out to, just as a matter of chance – but whether they are brought pursuant to a policy of starting legal proceedings without regard to the merits and for the purpose of injuring a market rival." *Id.* at 811 (citing *California Motor Transp.*, 404 U.S. at 512); *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 534 (9th Cir. 1991).

Finally, in the context of a judicial proceeding, if the alleged anticompetitive behavior consists of making intentional misrepresentations to the court, litigation can be deemed a sham if "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Liberty Lake Inv., Inc. v. Magnuson*, 12 F.3d 155, 158 (9th Cir. 1993); *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1260 (9th Cir. 1980).

It is obvious that these three ways in which litigation might be a sham do not necessarily extend beyond the litigation context. For instance, if the alleged anticompetitive behavior consisted of lobbying a state legislature (as in *Noerr*), rather than filing a suit in state court, it would seem quite pointless to ask whether the lobbying effort was "objectively baseless." To decide objective baselessness, we would need objective standards, of which there are few, if any, in the political realm of legislation, against which to measure the defendant's conduct.

Similarly, the second and third variants of the litigation sham exception do not make sense in the legislative realm. Subjecting a defendant to antitrust liability because it pursued a pattern of baseless legal claims does not generate the same collateral consequences as subjecting the same defendant to antitrust liability because it engaged in numerous unsuccessful attempts to lobby a state legislature – the latter would eviscerate the Petition Clause. And the sham exception for intentional fraud on a court cannot lightly be taken to apply in a legislative context because, as the Supreme Court has observed, the political arena has a higher tolerance for outright lies than the judicial arena does. *California Motor Transp.*, 404 U.S. at 512-13.

Thus, the scope of the sham exception to the *Noerr-Pennington* doctrine depends on the branch of government involved. If it is the legislature, the sham exception is extraordinarily narrow. But if it is the judicial branch, this circuit recognizes three categories of anticompetitive behavior that can amount to a sham and, therefore, outside the protection of the *Noerr-Pennington* doctrine.

The present case, however, involves neither a court nor a legislature. Here we deal with asserted anticompetitive behavior directed at an administrative agency, and the question we must decide is what the scope of the sham exception is when the executive branch of the government is involved. Complicating our inquiry is the fact that the executive branch is radically diverse. At the federal level, it encompasses everything from formal hearings before independent administrative agencies, which are bound, both procedurally and substantively, by statutes and regulations, to the unapologetically political

decisions of trade negotiators and other Presidential advisers. At the state level, executive officials can likewise be elected or appointed, and they also have greatly varying levels of discretion and independence.

It seems clear that for some kinds of executive entities, the sham exception to the *Noerr-Pennington* doctrine should be the same as it is for judicial bodies,[5] but for others such a sham exception would be far too broad. In recognition of the vastly different types of executive entities that exist, this circuit has generally shaped the sham exception according to our estimation of whether the executive entity in question more resembled a judicial body, or more resembled a political entity. In *Amarel*, for example, we analyzed the putatively sham litigation under the "objectively baseless" inquiry established by *Professional Real Estate*. 102 F.3d at 1519-20. We then lumped the petitioning of State Department officials and Korean government officials alongside the lobbying efforts directed at members of Congress, and brusquely held these petitioning efforts shielded by *Noerr-Pennington*. *Id.* at 1520. Similarly, in *Boone*, we noted that the

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[5] The Supreme Court suggested as much in *California Motor Transp.* when it lumped together courts and certain administrative agencies, and referred to them collectively as "adjudicatory tribunals" for purposes of the sham exception. 404 U.S. at 512. As should be clear from our opinion, this circuit does not read *California Motor Transp.* to say that *all* administrative entities are equivalent to judicial ones for purposes of *Noerr-Pennington*. Rather, *California Motor Transp.* suggests that an administrative agency should be treated like a judicial one only if the former is, in fact, acting in an "adjudicatory" capacity.

administrative agency in question made decisions virtually unguided by enforceable standards and that these decisions could be appealed only to a legislative body. 841 F.2d at 896. We concluded that the agency was essentially a political body, and we refused to apply the broader sham exception that exists for judicial entities. *Id.* Our holding in *Boone* followed from a prior holding in *Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Bd. of Culinary Workers*, 542 F.2d 1076 (9th Cir. 1976), that rejected the judicial sham exception for proceedings before the San Francisco Board of Permit Appeals, after concluding that the Board was essentially a political body. *Id.* at 1079.

By contrast, we have applied the judicial sham exception to proceedings before the Federal Maritime Administration, *Assigned Container*, 784 F.2d at 1423, and the Interstate Commerce Commission, *Clipper Exxpress*, 690 F.2d at 1262. We have suggested that the sham exception is narrower in communications with the police than it is in the legislative realm. *Forro Precision, Inc. v. IBM*, 673 F.2d 1045, 1060 (9th Cir. 1982). We have also discussed the sham exception as it applies to activities directed at a state attorney general, *Harman v. Valley Nat'l Bank*, 339 F.2d 564, 566 (9th Cir. 1964), and public airport officials, *In re Airport Car Rental Antitrust Litig.*, 693 F.2d 84, 86 (9th Cir. 1982), without clearly resolving the scope of the sham exception in those cases.

If the exact scope of the sham exception to the *Noerr-Pennington* doctrine has not always been clear in the administrative context, our cases at least stand for the general proposition that "the scope of immunity depends on the degree of political discretion exercised by the

government agency." *Forro Precision*, 673 F.2d at 1060 n.10. *See also Boone*, 841 F.2d at 896 ("If the agency and the council were acting as adjudicative bodies, the range of lobbying activities immunized by *Noerr-Pennington* would be much narrower.") Recent cases by the Supreme Court and this circuit (*e.g., Professional Real Estate, Amarel, USS-POSCO,* and *Liberty Lake*) have clarified the scope of the sham exception in judicial proceedings, but they do not alter this court's previous understanding that for purposes of the sham exception, executive entities are treated like judicial entities only to the extent that their actions are guided by enforceable standards subject to review. Only when administrative officials must follow rules is it meaningful to ask whether a petition before an agency was "objectively baseless," or whether there has been a pattern of petitioning without regard to the "merit" of the petitions. Similarly, our concern about intentional misrepresentation to government officials is much greater outside of the political realm.

IV. Kottle's Case

With this framework in mind, we now apply the sham exception to Kottle's case. The anticompetitive behavior that Kottle alleges consists of NWK's lobbying the Department against issuing a CON for KCKC's kidney dialysis center. Allegedly, NWK made numerous intentional misrepresentations to the Department and it engaged in improper and unlawful lobbying efforts.

If we thought that the Department was an essentially political entity, like the San Francisco Board of Permit Appeals, *see Franchise Realty*, 542 F.2d at 1079, Kottle's

suit would have absolutely no merit at all. Misrepresentations are a fact of life in politics, *California Motor Transp.*, 404 U.S. at 512, and lobbying is the sine qua non of democracy. *Id.* at 510-11.

We conclude, however, that the Department exercises a sufficiently circumscribed form of administrative authority that it is appropriate to apply the same sham exception here that we do in the litigation context. Heeding our own observation that executive entities come in many shapes and sizes, we will not list any single factor, or combination of factors, as decisive in determining whether the Department operates in a sufficiently non-political way to warrant application of the judicial sham exception. Rather, we look to the totality of the circumstances.

The CON determination by the Department bears many indicia of a true adjudicatory proceeding. The Department conducts public hearings, accepts written and oral arguments, permits representation by counsel, and allows affected persons to question witnesses. The Department must issue written findings after its hearing. Its decision is appealable, and that appeal is governed by APA procedures and statutory standards. In all, we believe that this combination of facts makes the application of the judicial sham exception appropriate in this case.

Thus, Kottle can get around the *Noerr-Pennington* doctrine only if his allegations show one of three things: (1) NWK's advocacy before the Department was objectively baseless and merely an attempt to stifle competition; (2) NWK engaged in a pattern of petitions before the

Department without regard to the merit of the petitions; or (3) NWK's misrepresentations before the Department deprived the entire CON proceeding of its legitimacy. We can easily dispense with the second of these grounds because Kottle's complaint alleges interference with only two CON applications. *See Amarel*, 102 F.3d at 1519 (holding that a handful of legal proceedings does not amount to a "pattern" of baseless claims).

We can also dispense with the first of these grounds. NWK's advocacy before the Department was not objectively baseless because NWK prevailed. In the litigation context, the Supreme Court has reminded us that a winning lawsuit is, by definition, not objectively baseless. *Professional Real Estate*, 508 U.S. at 61 n.5. Because we view the CON hearing as analogous to litigation, we must conclude that a victory before the Department necessarily indicates that NWK's position was not objectively baseless. *See Franchise Realty*, 542 F.2d at 1079 ("We find it particularly hard to accept the characterization as 'baseless' or 'frivolous' of opposition which is entirely successful in obtaining the governmental action sought, as apparently was the case here.") We note that Kottle did have the right to appeal the Department's decision, and had he obtained a reversal of the Department's denial of the CON, then NWK's initial victory before the Department would not necessarily indicate that NWK's position was not objectively baseless. *Hydranautics v. Filmtec Corp.*, 70 F.3d 533, 538 (9th Cir. 1995). A winning lawsuit that is overturned on appeal, after all, is not a winning lawsuit, and the same logic applies to an administrative ruling. As far as the record discloses, however, Kottle did not appeal the Department's ruling. Therefore, the success of NWK's

opposition to Kottle's CON applications conclusively demonstrates that the opposition was not objectively baseless.

This leaves Kottle with only the third of the sham exception possibilities. Notwithstanding *Noerr-Pennington*, Kottle can overcome a 12(b)(6) motion if his allegations demonstrate that NWK so misrepresented the truth to the Department that the entire CON proceeding was deprived of its legitimacy. Kottle's complaint, however, falls far short of adequately alleging this variant of the sham exception. He alleges in very general terms that NWK engaged in a hostile campaign to oppose the CON applications; that it used "means which were improper and/or unlawful"; that it conspired with other unnamed entities to oppose Kottle's CON applications; that it made misrepresentations about Kottle and the need for a kidney dialysis center, and encouraged others to do so; and that these statements influenced the Department's decision.

From Kottle's complaint, we do not know exactly what representations NWK made, or to whom; with whom NWK conspired; what exactly its "improper and/or unlawful" methods of advocacy were; or what other testimony the Department may have had that could have influenced its decision to deny Kottle's CON application. Normally, we would be willing to give Kottle the benefit of the doubt, because in reviewing a dismissal for failure to state a claim, we usually ask ourselves whether the plaintiff could prove *any* set of facts that would entitle

him to relief.[6] *Franchise Realty*, 542 F.2d at 1082. This case is different, however, because when "a plaintiff seeks damages . . . for conduct which is prima facie protected by the First Amendment, the danger that the mere pendency of the action will chill the exercise of First Amendment rights requires more specific allegations than would otherwise be required." *Id.* at 1083.

In such cases, we employ a heightened pleading standard, and that standard "would have no force if in order to satisfy it, a party could simply recast disputed issues from the underlying litigation as 'misrepresentations' by the other party." *Mohla*, 944 F.2d at 536 (citing *Omni Resource Dev. Corp. v. Conoco, Inc.*, 739 F.2d 1412, 1414 (9th Cir. 1984)).

We conclude, that Kottle's vague allegations of misrepresentation "are therefore insufficient to overcome *Noerr-Pennington* protection." *Id.*[7]

AFFIRMED.

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[6] It also appears that Kottle has taken his "best shot." The record does not disclose that he requested leave to amend his complaint.

[7] In addition to his challenge to NWK's *Noerr-Pennington* immunity, Kottle contends that the district court erred in not striking an affidavit attached to NWK's reply memorandum in support of its motion to dismiss. The affidavit's sole purpose was to put before the court certain public records of the Department. We agree with the district court that these records were properly the subject of judicial notice; therefore, reliance on them did not convert the motion to dismiss into a summary judgment motion. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994).

APPENDIX B

United States District Court

WESTERN DISTRICT OF WASHINGTON

SHELDON P. KOTTLE,

v.

NORTHWEST KIDNEY CENTERS,

JUDGMENT IN A CIVIL CASE

CASE NUMBER: C96-472D

[ ] **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendant's motion to dismiss is GRANTED and this action is DISMISSED.

(Filed Oct. 4, 1996)

October 4, 1996
Date

Bruce Rifkin
Clerk

/s/ Elva McGregor
(By) Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SHELDON P. KOTTLE Plaintiff, v. NORTHWEST KIDNEY CENTER Defendant.	No. C96-0472D ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

After careful consideration, plaintiff's motion for Reconsideration is DENIED. The Court wishes to clarify an apparent misunderstanding by plaintiff of the Court's earlier order by making it clear that plaintiff's status as a for-profit entity was not a pivotal element of the Court's decision. Had the plaintiff been a non-profit corporation, the Court's decision would have been identical.

The Clerk of the Court is directed to send copies of this order to all counsel of record.

DATED this 30th day of October, 1996.

/s/ Carolyn R. Dimmick
Carolyn R. Dimmick
Chief Judge

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SHELDON P. KOTTLE, Plaintiff-Appellant, v. NORTHWEST KIDNEY CENTERS, Defendant-Appellee.	No. 96-36258 DC No. CV 96-0472 CRD **ORDER** (Filed Aug. 19, 1998)

Before: THOMPSON and TASHIMA, Circuit Judges, and STAGG, District Judge.*

Appellant's motion to allow replacement of petition for rehearing which, in substance, is a motion to permit the late filing of an untimely petition for rehearing, is granted and the petition for rehearing received by the Clerk on Jul. 23, 1998, together with the motion, is ordered filed.

The petition for rehearing is denied.

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* The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

APPENDIX E

15 U.S.C. § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

(July 2, 1890, ch 647, § 1, 26 Stat. 209; Aug. 17, 1937, ch 690, Title VIII, § 1, 50 Stat. 693; July 7, 1955, ch 281, 69 Stat. 282; Dec. 21, 1974, P.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, P.L. 94-145, § 2, 89 Stat. 801; Nov. 16, 1990, P.L. 101-588, § 4(a), 104 Stat. 2880.)

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15 U.S.C. § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000 or by imprisonment not exceeding three years,

or by both said punishments, in the discretion of the court.

(July 2, 1890, c. 647, § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282; Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Nov. 16, 1990, Pub.L. 101-588, § 4(b), 104 Stat. 2880.)

RCW 70.38.115.

(1) Certificates of need shall be issued, denied, suspended, or revoked by the designee of the secretary in accord with the provisions of this chapter and rules of the department which establish review procedures and criteria for the certificate of need program.

(2) Criteria for the review of certificate of need applications, except as provided in subsection (3) of this section for health maintenance organizations, shall include but not be limited to consideration of the following:

(a) Until June 30, 1990, the relationship of the health services being reviewed to the applicable health plans;

(b) The need that the population served or to be served by such services has for such services;

(c) The availability of less costly or more effective alternative methods of providing such services;

(d) The financial feasibility and the probable impact of the proposal on the cost of and charges for providing health services in the community to be served;

(e) In the case of health services to be provided, (i) the availability of alternative uses of project resources for the provision of other health services, (ii) the extent to which such proposed services will be accessible to all residents of the area to be served, and (iii) the need for and the availability in the community of services and facilities for osteopathic and allopathic physicians and their patients. The department shall consider the application in terms of its impact on existing and proposed institutional training programs for doctors of osteopathy and medicine at the student, internship, and residency training levels;

(f) In the case of a construction project, the costs and methods of the proposed construction, including the cost and methods of energy provision, and the probable impact of the construction project reviewed (i) on the cost of providing health services by the person proposing such construction project and (ii) on the cost and charges to the public of providing health services by other persons;

(g) The special needs and circumstances of osteopathic hospitals, nonallopathic services and children's hospitals;

(h) Improvements or innovations in the financing and delivery of health services which foster cost containment and serve to promote quality assurance and cost-effectiveness;

(i) In the case of health services proposed to be provided, the efficiency and appropriateness of the use of existing services and facilities similar to those proposed;

(j) In the case of existing services or facilities, the quality of care provided by such services or facilities in the past; and

(k) In the case of hospital certificate of need applications, whether the hospital meets or exceeds the regional average level of charity care, as determined by the secretary.

Enacted by Laws 1979, Ex. Sess., ch. 161, § 11, eff. Jan. 1, 1980. Amended by Laws 1980, ch. 139, § 8, eff. Jan. 1, 1981; Laws 1983, ch. 235, § 8; Laws 1984, ch. 288, § 22; Laws 1989, ch. 175, § 126, eff. July 1, 1989; Laws 1989, 1st Ex. Sess., ch. 9, § 605, eff. July 1, 1989.

WAC 246-310-190 Ex parte contacts. (1) There shall be no ex parte contacts as defined in WAC 246-310-010(17) after whichever of the following occurs last:

(a) The conclusion of a public hearing held in accordance with WAC 246-310-180, or

(b) The final action of the appropriate regional health council, or

(c) The final action of the hospital commission.

* * *

WAC 246-310-200 Bases for findings and action on applications. (1) The findings of the department's review

of certificate of need applications and the action of the secretary's designee on such applications shall, with the exceptions provided for in WAC 246-310-470 and 246-310-480 be based on determinations as to:

(a) Whether the proposed project is needed;

(b) Whether the proposed project will foster containment of the costs of health care;

(c) Whether the proposed project is financially feasible; and

(d) Whether the proposed project will meet the criteria for structure and process of care identified in WAC 246-310-230.

* * *

WAC 246-310-210 Determination of need. The determination of need for any project shall be based on the following criteria, except these criteria will not justify exceeding the limitation on increases of nursing home beds provided in WAC 246-310-810.

(1) The population served or to be served has need for the project and other services and facilities of the type proposed are not or will not be sufficiently available or accessible to meet that need. The assessment of the conformance of a project with this criterion shall include, but need not be limited to, consideration of the following:

* * *

(b) In the case of health services or facilities proposed to be provided, the efficiency and appropriateness of the use of existing services and facilities similar to those proposed.

* * *

WAC 246-310-500 Issuance, suspension, denial, revocation, and transfer of a certificate of need.

* * *

(3) The department shall apply the following provisions when suspending a certificate of need.

(a) The secretary's designee may suspend a certificate of need for cause which shall include, but not be limited to:

(i) Suspicion of fraud,

(ii) Misrepresentation,

(iii) False statements,

(iv) Misleading statements,

(v) Evasion or suppression of material fact in the application for a certificate of need or any of its supporting materials.

* * *

(6) The department shall apply the following provisions in the revocation of a certificate of need.

(a) The secretary's designee may revoke a certificate of need for cause which shall include the following:

(i) Fraud,

(ii) Misrepresentation,

(iii) False statements,

(iv) Misleading statements, and

(v) Evasion or suppression of material facts in the application of a certificate of need, or in any of its supporting materials.

* * *

Supreme Court, U.S.
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No. 98-810

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SHELDON P. KOTTLE,

Petitioner,

vs.

NORTHWEST KIDNEY CENTERS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court and the Ninth Circuit correctly conclude that the vague allegations of misrepresentation in Petitioner's Complaint are insufficient to overcome *Noerr-Pennington* protection for Northwest Kidney Centers' petitioning of the government?

2. As an alternative basis for upholding the district court's decision dismissing the Complaint, are Petitioner's claims barred by the applicable statutes of limitation since he pled no overt acts by Respondent within the four years immediately preceding the filing of the Complaint?

PARTIES TO THE PROCEEDING

Petitioner is Sheldon P. Kottle, M.D. Respondent is Northwest Kidney Centers, a non-profit corporation organized under the laws of the State of Washington.

RULE 29.6 STATEMENT

Northwest Kidney Centers has no parent company or subsidiaries.

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